No. 02-138

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

LARRY A. CAMPBELL,

Petitioner,

v.

JOHN W. LYON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Thomas J. Zagami
Counsel of Record
THOMAS J. ZAGAMI, P.A.
901 Dulaney Valley Road
Suite 400
Baltimore, Maryland 21204
(410) 339-6741

Counsel for Petitioner

Robert S. Campbell
HODES, ULMAN, PESSIN & KATZ, P.A.
901 Dulaney Valley Road
Suite 400
Baltimore, Maryland 21204
(410) 339-6741

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Northern District of Maryland violated the Petitioner's due process rights under the Fifth Amendment to the United States Constitution by compelling the Petitioner to proceed to trial on a cause of action that: (i) had not been pled by the Respondent; (ii) was imposed *sua sponte* by the District Court less than one business day prior to commencement of trial; and (iii) shifted and elevated the burden of proof at trial from the Respondent to the Petitioner.

II. Whether the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Northern District of Maryland departed so far from the acceptable and usual course of judicial proceedings, by allowing the Respondent, in his capacity as a shareholder of a parent corporation, to maintain a direct cause of action against the board of directors of a subsidiary corporation in which the Respondent was not a shareholder, such that this Court should exercise its supervisory power.

III. Whether the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Northern District of Maryland departed so far from the acceptable and usual course of judicial proceedings, by granting equitable relief to Respondent after the District Court's finding that the Respondent and one of his witnesses had committed perjury both at trial and in prior proceedings in the case, such that this Court should exercise its supervisory power.

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REPLY ARGUMENT

I. THE PETITIONER HAS NOT WAIVED HIS CONSTITUTIONAL CLAIM THAT THE DISTRICT COURT'S *SUA SPONTE* RULINGS ON THE EVE OF TRIAL, AS AFFIRMED BY THE FOURTH CIRCUIT, PREJUDICED HIM AND VIOLATED HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Respondent Lyon's assertion in his Brief in Opposition that Petitioner Campbell's constitutionally-based claim has been waived is devoid of merit. In his Brief in Opposition, Respondent Lyon erroneously asserts that this claim "is not cognizable here because he [Petitioner Campbell] never urged below that the rulings at issue infringed upon his Fifth Amendment rights, ..."See Brief in Opposition, p. 3. Respondent Lyon, while never uttering one word about the substantive merits of the constitutional claim, then editorializes that this is "a rather significant procedural omission which entirely escapes mention in Mr. Campbell's Petition for Certiorari." Id.

Respondent Lyon, however, could not be more wrong, both as a matter of law and as a matter of fact. Ironically, and contrary to Respondent Lyon's contention, the "omission which entirely escapes mention "occurs in Respondent Lyon's own Brief in Opposition and not in Petitioner Campbell's Petition for Writ of Certiorari. Respondent Lyon's erroneous assertion shows a total disregard for prior rulings of this Court cited in Petitioner Campbell's Petition for Writ of Certiorari, as well as of the record in this case.

This Court, for example, addressed the very question of waiver urged here by Respondent Lyon in *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 120 S.Ct. 1579, 146 L. Ed. 2d

530 (2000), a case which was relied upon by Petitioner Campbell in his Petition but which was completely ignored by Respondent Lyon in his Brief in Opposition. Instead, and for obvious reasons, Respondent Lyon attempts to deflect this Court's attention to two prior decisions of this Court, *Adams v. Washington*, 520 U.S. 83, 117 S.Ct. 1028, 137 L. Ed. 2d 203 (1997) and *Beck v. Washington*, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962), neither of which are on point here.

In *Nelson*, Respondent Adams, the same as Respondent Lyon here, urged that the due process claim had been waived by the petitioner because he did not raise the claim below. 529 U.S. at 469. This Court rejected Adams' argument in *Nelson*, the same as it should reject Respondent Lyon's argument here. In so ruling, this Court held in *Nelson* that:

> It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. But this principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue (citation omitted).

Id. This Court then concluded in *Nelson* that the due process matter was fairly before the lower court because the petitioner's counsel argued that the "core of his clients' argument was the fundamental unfairness" of the process he was subjected to by the lower court and that the lower courts understood that was an issue before them. Id. at 470. The same is true here.

As explained in the Statement of the Case set forth in Petitioner Campbell's Petition for Writ of Certiorari, which is incorporated herein by reference, Petitioner Campbell's

counsel argued unfairness and prejudice as a result of the process he was subjected to by the lower court from the moment the trial court entered its *sua sponte* ruling on the eve of trial. Also as explained in the Statement of the Case, to make his objection clear and to ensure that the objection was properly preserved for appeal, counsel for Petitioner Campbell reiterated the objection on the record the very next business morning, before the trial commenced. Petitioner Campbell's counsel stated:

> And I just want to put on the record, Your Honor, our objection to going forward on the constructive trust . . . .

(App. 40). When asked by the lower court how Petitioner Campbell was prejudiced, moreover, Petitioner Campbell's counsel gave two very specific examples -- the first relating to the shift in the burden of proof and the second relating to the sudden unavailability of the presumptions afforded to Petitioner Campbell previously by the business judgment rule upon which all discovery and all prior proceedings had been premised. (App. 41-42). The lower court acknowledged but overruled Petitioner Campbell's objection (App. 42). Yet, less than 36 hours later, as further explained in Petitioner Campbell's Petition for Writ of Certiorari, these were the very reasons the District Court imposed a constructive trust on Petitioner Campbell.

On appeal, Petitioner Campbell argued at length the issues of unfairness and prejudice resulting from the lower court's actions. The Fourth Circuit, moreover, clearly understood that issue was before them. In point of fact, and again noticeably absent from Respondent Lyon's Brief in Opposition, the Fourth Circuit stated in pertinent part: "[W]e address Campbell's claim that he suffered unfair surprise and prejudice because the district court at the last

minute transformed Lyon's breach of fiduciary duty claim into a claim for imposition of a constructive trust." (App. 6).

There can be no dispute in this case that Petitioner Campbell did not waive his constitutionally-based claim that his due process rights were violated by the District Court's last minute *sua sponte* ruling, as affirmed by the Fourth Circuit. Indeed, the procedural improprieties were argued at every turn by Petitioner Campbell and those arguments were fairly before the lower court as required by *Nelson*. It is appropriate, therefore, for this Court to consider that claim and Petitioner Campbell again respectfully requests that the Court do so.

II. THE ALTERNATIVE GROUNDS FOR REVIEW ASSERTED BY PETITIONER CAMPBELL ALSO PRESENT PROPER BASES FOR REVIEW

The balance of Respondent Lyon's Brief in Opposition raises no new issues. Rather, Respondent Lyon merely purports to respond to issues raised in Petitioner Campbell's Petition for Writ of Certiorari by, again, misstating that no authority is cited by Petitioner Campbell for such alternative grounds for review. Petitioner Campbell, therefore, incorporates herein the balance of the arguments and legal authorities presented in his initial Petition as his Reply to Respondent Lyon's Brief in Opposition.

CONCLUSION

For the reasons stated herein, and in his Petition for Writ of Certiorari, Petitioner Larry A. Campbell respectfully submits that the questions presented herein merit consideration by this Court. Accordingly, Petitioner Larry A. Campbell respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review the decisions below.

Respectfully submitted,

Thomas J. Zagami
Counsel of Record
THOMAS J. ZAGAMI, P.A.
Suite 400
901 Dulaney Valley Road
Baltimore, Maryland 21204
(410) 339-6741

Counsel for Petitioner

Robert S. Campbell
HODES, ULMAN, PESSIN & KATZ, P.A.
Suite 400
901 Dulaney Valley Road
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(410) 339-6741

Counsel for Petitioner